

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GARY P.

Claimant,

vs.

PORTERVILLE DEVELOPMENTAL
CENTER,

Service Agency.

OAH No. N 2006100340

DECISION

Administrative Law Judge Robert Walker, State of California, Office of Administrative Hearings, heard this matter in Porterville, California, on December 8, 2006.

Norris Edwards, Director of the Office of Performance Excellence for Porterville Developmental Center, represented the service agency, Porterville Developmental Center.

Clennel P., claimant's brother, represented the claimant, Gary P.

The matter was submitted on December 8, 2006.

SUMMARY AND ISSUES

Claimant has a right to make choices concerning his life. He has a right to make choices concerning the way he spends his time. Claimant was employed in the upholstery shop. While he was temporarily working in the ceramics studio, he was accused of stealing an ash tray. The staff found that the accusation was true and disciplined claimant by terminating his employment in the upholstery shop.

Claimant denies that he stole the ash tray. He contends that terminating his employment was unfair and violated his right to make choices concerning the way he spends

his time. He seeks an order requiring the developmental center to permit him to return to his employment in the upholstery shop.

The issue is whether claimant has a right to return to his employment in the upholstery shop.

FACTUAL FINDINGS

BACKGROUND

1. Claimant, Gary P., is a 43 year old man, who was admitted to Porterville Developmental Center in November of 2003. He has a diagnosis of mild mental retardation and psychotic disorder not otherwise specified. Within the terms of the Lanterman Act,¹ claimant is a person with a developmental disability.

2. Claimant worked in the upholstery shop. In July of 2006, Dan Delk, the upholstery instructor, was on vacation for two weeks, and all of the people who worked in the upholstery shop worked in other places. For a few days, claimant worked in the ceramics studio.

3. Leanne Buenrostro is a psychiatric technician, who works as a job coach in the ceramics studio. On approximately July 11, 2006, claimant showed Ms. Buenrostro an ash tray and told her he wanted to buy it. Ms. Buenrostro told claimant that he could buy it and have the developmental center ship it to someone outside of the center but that it was a prohibited item for clients in the center. It was prohibited because it could be broken into pieces, and the pieces could be used as a weapon. After Ms. Buenrostro explained that to claimant, he no longer seemed interested in buying the ash tray.

INCIDENT OF JULY 14, 2006

4. On July 14, 2006, Keyshan B., a client at the developmental center, who worked in a detail that collects trash, came into the ceramics studio, collected the trash, and went back into the hall.

5. The developmental center contends that, while Keyshan B. was collecting the trash, claimant got the ash tray he had inquired about buying, put it in the trash can, and asked Keyshan B. to help him retrieve it after Keyshan B. removed the trash from the room. Claimant denies any involvement in the matter.

6. Juan Avalos is a psychiatric technician, who is in charge of the detail that collects trash. On July 14, 2006, he was in the hall outside of the ceramics studio when

¹ The Lanterman Developmental Disabilities Services Act begins at Welfare and Institutions Code section 4400.

Keyshan B. left the studio with the trash. Mr. Avalos testified that Keyshan B. said to him, "I need to talk to you. Gary threw this in the trash, and I don't want to get into trouble about it."

7. At the hearing in this matter, Keyshan B. testified that he had not made that statement to Mr. Avalos. He testified that he does not know how the ash tray got into the trash can, that Mr. Avalos was the one who raised the matter of what the ash tray was doing in the trash, and that claimant had nothing to do with stealing.

8. Mr. Avalos's report of what Keyshan B. said to him comes into evidence pursuant to an exception to the hearsay rule. Evidence Code section 1235 provides that "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 provides that "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless . . . [t]he witness was so examined while testifying as to give him an opportunity to explain or deny the statement . . ." Keyshan B. was so examined while testifying as to give him an opportunity to explain or deny the statement that Mr. Avalos attributed to him. Thus, Mr. Avalos's report comes into evidence as other than hearsay.

9. Mr. Avalos reported the matter to the staff in the ceramics studio, and Ms. Buenrostro confronted claimant about the matter. Ms. Buenrostro testified that claimant admitted that he had asked Keyshan B. to take the ash tray from the studio.

10. Ms. Buenrostro's report of claimant's admission comes into evidence pursuant to an exception to the hearsay rule. Evidence Code section 1220 provides that "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party"

11. There is hearsay evidence that claimant asked Keyshan B. to help him take the ash tray and that claimant put the ash tray in the trash can. Ms. Buenrostro testified that another client said that he saw claimant put the ash tray in the trash and heard claimant ask Keyshan B. to take the ash tray out of the studio for him. And Mr. Avalos testified that numerous clients said that they had seen claimant put the ash tray in the trash can. This hearsay evidence, by itself, would not be sufficiently persuasive to support a finding. It, however, tends to supplement and explain the non hearsay evidence.

12. Claimant testified that he had nothing to do with the ash tray's being removed from the studio. He testified that Ms. Buenrostro had explained to him that he could not have the ash tray in the facility. And he argued that there would have been no point in his taking it because it would have been discovered and taken from him.

RESOLUTION OF CONFLICTS IN THE EVIDENCE

13. Mr. Avalos testified that claimant and Keyshan B. get together to smoke cigarettes. He testified, further, that on July 14, 2006, sometime after the incident, he overheard claimant talking to Keyshan B. Mr. Avalos testified that claimant, in a confrontational tone, asked Keyshan B., “What did you tell your boss for?”

14. Both Mr. Avalos and Ms. Buenrostro were very believable witnesses, and there was no evidence that either of them had any reason to be other than truthful.

15. It is found that claimant put the ash tray in the trash can and solicited Keyshan B’s assistance in removing it from the studio.

APPROPRIATENESS OF DISCIPLINE IMPOSED

16. Clients at the developmental center who have work assignments are provided with an orientation. There is a general orientation entitled “dress code and rules of conduct.” One of the rules of conduct is “no stealing or borrowing any items from the worksite” At the time claimant began working in the upholstery shop, Mr. Delk, the upholstery instructor, provided an additional orientation for claimant. One of the rules in Mr. Delk’s additional orientation was “no stealing.”

17. It is found that claimant had been told that stealing would not be tolerated.

18. It is further found that terminating claimant’s employment in the upholstery shop was an appropriate discipline.

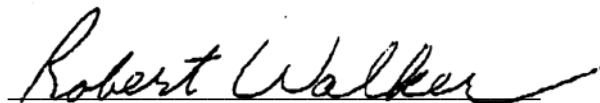
LEGAL CONCLUSIONS

Welfare and Institutions Code section 4502, subdivision (j), concerns the right of persons with developmental disabilities to make choices in their own lives. The matters concerning which they have a right to make choices include the way they spend their time – including time spent in “education, employment, and leisure” Claimant contends that the developmental center falsely determined that he stole an ash tray and unfairly terminated him from his employment in the upholstery shop. By reason of the matters set forth in Findings 3 through 15, it is determined that claimant did steal an ash tray. And by reason of the matters set forth in Findings 15 through 18, it is determined that terminating claimant’s employment was an appropriate disciplinary measure.

ORDER

Claimant's appeal is denied.

DATED: December 21, 2006

A handwritten signature in black ink, reading "Robert Walker", with a long horizontal flourish extending to the right.

ROBERT WALKER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is a final administrative decision. Both parties are bound by this decision.
Either party may appeal this decision to a court of competent jurisdiction within 90 days.